UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NORTHWESTERN UNIVERSITY,	)	
	)	
Employer,	)	
	)	
and	)	Case 13-RC-121359
	)	
COLLEGE ATHLETES PLAYERS ASSOCIATION (CAPA),	)	
	)	
Petitioner.	)	

NORTHWESTERN UNIVERSITY'S BRIEF TO THE BOARD ON REVIEW OF REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

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I. INTRODUCTION AND REQUEST FOR ORAL ARGUMENT

For more than 100 years, Northwestern University has provided opportunities for its students to participate in intercollegiate sports. It has done so because it believes that athletic competition and achievement are key components in shaping the character and education of participating students. Northwestern offers some of its intercollegiate student-athletes full scholarships to support their education, but Northwestern makes no distinction between scholarship and non-scholarship athletes in terms of educational opportunities or responsibilities. As is the case with all of its students, Northwestern admits scholarship and non-scholarship student-athletes only after its admissions officials are satisfied that they possess the ability to succeed academically and graduate. Its football program exemplifies Northwestern's integration of athletics and education. When Northwestern offers football scholarships to prospective students, it commits at the outset to support their education for four years. The coaching staff and athletic department support the students fully in their academic endeavors, providing educational services and flexibly arranging athletic commitments to enable Northwestern's football student-athletes to achieve their academic goals, including a nation's-best 97 percent graduation rate.

This case of first impression – a fact that the Regional Director ignored – poses the novel issue whether Northwestern's decision to offer some of its football team's student-athletes full scholarships transforms what has always been a cooperative educational relationship between university and student into an adversarial employer-employee relationship. On the record before the Board, there is no reason in law or policy to conclude that it does. The Board's decision in Brown University, 342 NLRB 483 (2004), still provides the proper framework for evaluating whether students in a university setting should be deemed employees. And the fact remains that creating an adversarial collective-bargaining arrangement for students engaged in an activity that

is integrated into a university's educational mission will unavoidably entangle the Board in academic decisions. The Board should adhere to the Brown standard, which, properly applied here, dictates that Northwestern's football scholarship student-athletes are fundamentally Northwestern students, and not Northwestern employees.

Kain Colter, Petitioner's lone fact witness, came to Northwestern with a dream to play professional football. He testified at the hearing that he viewed the substantial time he devoted to developing himself as a football player and to the football team as a job. He worked hard, on and off the field, to graduate early so that he could participate in the NFL "combine," which is a major opportunity for prospective NFL players to demonstrate their skills to NFL teams in advance of the draft. That Colter pursued that dream while also receiving an elite Northwestern University education is to his credit. But, contrary to the one-sided view of the record provided by the Regional Director, it does not make his participation in Northwestern's football program a job for which he was employed. Other Northwestern football student-athletes who testified at the hearing viewed their time on the football team as fundamentally part of their overall endeavor of obtaining the highest quality education. They acknowledged the truth of what Northwestern has believed for years: intercollegiate athletics supports Northwestern's mission of providing an elite educational experience. Playing football at Northwestern undoubtedly places substantial demands on the time of student-athletes. But, like numerous other time-intensive out-of-classroom activities at Northwestern, that time contributes to the students' education.

Northwestern is keenly aware of the debate surrounding the status and treatment of NCAA FBS Division student-athletes. But the Board should not mistake this case for an opportunity to "reform" major college football. Major college football in general is not before the Board. Most schools that make up the NCAA FBS Division, such as state schools, are not

within the Board's jurisdiction. For a variety of reasons detailed below, whether or not one believes college football is in need of reform, the Board is not the appropriate entity to provide such reform.

II. STATEMENT OF FACTS

The Regional Director's Decision and Direction of Election ("DDE") is replete with factual errors and mischaracterizations of the record. The discussion below focuses on those errors and mischaracterizations most directly relevant to whether Northwestern's scholarship football students are employees under Section 2(3) the National Labor Relations Act (the "Act").

A. BACKGROUND FACTS

Northwestern is a premier non-profit, private coeducational university with campuses in Evanston and Chicago, Illinois, and Education City, Qatar. (DDE at 2; Tr. 1220; Jt. Ex. 21; Jt. Ex. 28 at NU 2379) Approximately 20,000 full and part-time students are enrolled at the University, including approximately 8,400 undergraduates at its largest campus in Evanston, Illinois. (Tr. 1178; Jt. Ex. 28 at NU 2379) Intercollegiate athletics is just one of the 480 extracurricular activities Northwestern offers its students. (Jt. Ex. 28 at NU 2380) Northwestern is a member of the Big Ten Conference and the National Collegiate Athletic Association. (Jt. Ex. 21) Northwestern's football program and its participating students are subject to the NCAA's rules, policies, and requirements. (Jt. Ex. 22) The Big Ten Conference is a Division I collegiate athletic conference whose members compete exclusively in the NCAA. (Tr. 478-80; Jt. Ex. 20)

B. THE FOOTBALL PROGRAM IS PART OF NORTHWESTERN'S EDUCATIONAL EXPERIENCE

Northwestern's football program is one of 19 varsity athletic programs the University offers to female and male students. (Jt. Ex. 16 at NU 38) Patrick Fitzgerald has been the Head Coach of Northwestern's football program since 2006. (Tr. 1018) The Northwestern football team is comprised of approximately 112 student-athletes, including 85 student-athletes who

receive athletic scholarships to offset the cost of their education. (Tr. 1034-35) Approximately 25 percent of the football squad is comprised of walk-on student-athletes, who do not receive athletic scholarships but who practice, play, and participate as members of the team on the same basis as scholarship student-athletes. (Tr. 1036-37, 1223; Em. Ex. 6)

Consistent with an authorizing NCAA bylaw that has been in effect since October 2011, Northwestern provides four-year scholarship offers, or tenders, with the option of renewal for a fifth year, to its student-athletes. (Tr. 491-92, 751, 788-89) The NCAA does not require that its members provide four-year scholarships, but Northwestern does so because of its overriding commitment to the education of its student-athletes. Student-athletes at Northwestern do not receive W-2's and do not pay taxes on scholarship funds. The Regional Director erroneously found this evidence irrelevant. (DDE at 3) The Regional Director also disregarded evidence that scholarship funds are not distributed through the payroll department and student-athletes do not receive payroll checks. (Compare Tr. 247, 250, 649 with DDE at 14) Tuition payments are made directly from the University's financial aid accounts to the University's educational accounts on behalf of the student-athletes. (Tr. 247-48)

Athletic scholarships cannot be canceled due to a student's athletic ability, performance, contributions (or lack thereof) to the team's success, injury or any other athletic reason. (Tr. 241, 578-79, 740, Jt. Ex. 11 at NU 1656) Despite only two non-renewals in the last five years, for violations of rules applicable to *all* Northwestern students, the Regional Director speculated that a "threat" of revocation "hangs over the entire team and provides a powerful incentive for them to attend practices and games, as well as abide by all the rules they are subject to." (DDE at 15)[1]

[1] The Regional Director misstated the decision-making process with respect to non-renewals, finding that Coach Fitzgerald recommended that two scholarships be canceled. (DDE at 4) To the contrary, Fitzgerald testified without contradiction that in both cases involving non-renewals for egregious misconduct, he spoke with the

C. IN RECRUITING ALL STUDENTS, INCLUDING STUDENT-ATHLETES, NORTHWESTERN FOCUSES ON THEIR ABILITY TO SUCCEED ACADEMICALLY

To play football at Northwestern, a young man must be admitted as a student at Northwestern. (Tr. 1190-91; Jt. Ex. 16 at NU 13-15 and 24; Jt. Ex. 17 at NU 187-91) Northwestern is highly selective in its admissions process[2] and holistically reviews all applicants in an effort to admit only those who are capable of thriving academically. (Tr. 1181-82, 1190-91) The admissions standards are stringent for all potential students, including football student-athletes, and no amount of athletic talent will win a football player admission if he has not demonstrated that he can succeed academically. (Tr. 813-14, 1025-26, 1031, 1185-86, 1190-91) The Regional Director distorted this evidence, stating that "but for their football prowess the players would not have been offered a scholarship." (DDE at 21) The evidence makes clear that it is equally true that "but for" their academic prowess, they would not have been offered a scholarship.

Northwestern has a pre-approval process for prospective student-athletes, which involves multiple layers of review, all focusing on a candidate's ability to succeed academically. (Tr. 814, 816, 1026, 1031-32, 1162, 1189-90) The first layer involves the football coaches, who seek only candidates they believe will progress to graduation within four years. (Tr. 1026, 1031-32, 1162) Next, a prospective student-athlete's academic credentials are examined and separately assessed by the Deputy Director of Athletics for Student-Athlete Welfare. (Tr. 815-16, 1031-33) Only if that administrator is satisfied that the prospective student can succeed academically is the student presented to the Office of Undergraduate Admissions. (Tr. 813-16, 1031-33)

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students and their families, determined that both wanted to pursue playing football at other schools, and assisted them with doing so. (Tr. 1174-76)

[2] In the 2013-2014 academic year, the University received 33,600 applications for only 2,025 freshman vacancies and 1,500 transfer applications for approximately 100 vacancies. (Tr. 1179)

Admissions Office personnel independently assess credentials of prospective student-athletes with a focus again on whether the individual can succeed academically at Northwestern, as they do with any candidate. (Tr. 1190-91) Admissions Office personnel have no contact with the coaching staff during this process to avoid any potential pressure to pre-approve a candidate who the Admissions Office does not believe can succeed academically. (Tr. 1034, 1188, 1189) If the Admissions Office pre-approves the candidate, he must complete the formal application for undergraduate admission. (Tr. 1033) The final admission decisions, and the ultimate offers of admission, are made by the Admissions Office, and the University's football personnel have no involvement at that stage. (Tr. 820) The Admissions Office has authority to, and does, reject candidates who fail to meet admission standards.[3] (Tr. 1034)

D. THE SCHOLARSHIP OFFER IS AN AWARD OF FINANCIAL AID, NOT AN OFFER OF EMPLOYMENT

The football scholarship offer, consisting of a cover letter from Coach Fitzgerald, the Big Ten Tender of Financial Aid, and the National Letter of Intent, informs prospective student-athletes of Northwestern's status as a premier academic institution, including Northwestern's rank as the 12th best university in the nation and the football team's status as the "highest ranking [Division I football] program in the nation." (Em. Ex. 5; Tr. 500) Coach Fitzgerald also informs potential student-athletes that "our staff will take pride in helping you develop into the best you can be on and off the field" and that "[c]hoosing Northwestern is a decision that will change the next 40 years of your life, not just the next four." (Id.) Apart from the cover letter from Coach Fitzgerald, the NCAA regulates the content of the National Letter of Intent, and the Big Ten Conference dictates the language of the Tender of Financial Aid. (Tr. 488)

[3] If a candidate is rejected by the Admissions Office, a coach can request another review, in which case Athletic Department Administrators – not coaches – present the candidate to the Provost. During this process, the Admissions Office makes recommendations to the Provost and remains directly involved in the final decision. (Tr. 1189-90)

The Regional Director transformed the Tender of Financial Aid, which is an offer of financial aid, into "an employment contract" that "gives the players detailed information concerning the duration and conditions under which the compensation will be provided to them." (Compare DDE at 10-11, 14-15 with Tr. 487-89, 733-35; Em. Ex. 5 at NU 969-74) The Tender in fact outlines conditions for receiving financial aid, just like the award letters sent to the 60 percent of students at Northwestern who receive need-based financial aid, and makes no mention of "employment" or "labor" or "services" or "hire."[4] (Tr. at 720-21; Em. Ex. 14 at 1-2)

E. NORTHWESTERN'S COMMITMENT TO THE EDUCATION OF ITS STUDENT-ATHLETES IS EXEMPLIFIED BY THE WIDE RANGE OF ACADEMIC SERVICES IT OFFERS THEM

Northwestern's football student-athletes pursue more than 20 distinct majors across the various undergraduate and graduate programs, consistently maintain a cumulative GPA over 3.00, and graduate at a 97 percent rate, best in the nation.[5] (Tr. 499, 879-82, 912-13, 1025, Em. Ex. 26; Em. Ex. 27) The Regional Director merely "noted" this evidence in passing (DDE at 13), and ignored its significance in demonstrating that the relationship between Northwestern and its student-athletes is primarily educational, not economic. The Regional Director also ignored Northwestern's mission statement, which emphasizes the importance of athletics in the University's overall educational mission. (Jt. Ex. 21) He likewise ignored Congress's determination, embodied in Title IX, that "the opportunity for students to participate in

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[4] Northwestern annually provides approximately $139 million in financial assistance to its students (Tr. 720), with only about $15 million representing athletic aid. (Id.; Em. Ex. 16) Need-based award letters explain the amount and type of aid being given to the student, and must be affirmatively accepted by the student. (Em. Ex. 14) Just like athletic aid, need-based aid is subject to revocation for failure to maintain satisfactory academic progress as well as failure to remain in "good standing" (e.g., for violating University rules). (Tr. 786-87) Like student-athletes, students whose need-based aid is revoked may appeal such decisions. (Id.) An athletic scholarship will be canceled if the student-athlete quits the team, just as a debate student who stops participating in debate tournaments will lose his debate scholarship. (Tr. 771-72; Em. Ex. 15 at 7)

[5] The Northwestern football program has won the American Football Coaches Association award for having the highest graduation rate in the country a total of seven times. (Tr. 1046) During the 2013 season, 36 Northwestern football student-athletes were named to the All-Big Ten Academic Team. (Tr. 1047)

intercollegiate athletics is a vital component of educational development." Mansourian v. Bd. of Regents of Univ. of Calif. at Davis, 816 F. Supp. 2d 869, 874 (E.D. Cal. 2011).

Indeed, the Regional Director not only ignored evidence demonstrating the integration of athletics and academics and Northwestern's commitment to the academic success of its student-athletes, but turned that evidence on its head by mischaracterizing Northwestern's academic support services for its student-athletes as "athletic duties" in place to "pervasively control" the lives of student-athletes solely to keep them eligible to play football. (DDE at 12, 16-17) In fact, the Athletic Department monitors student-athletes not just to ensure NCAA eligibility, but to ensure that student-athletes achieve the primary goal of academic success. (Tr. 810, 860, 870)

To help student-athletes succeed academically, Northwestern provides a host of comprehensive services and resources. (Tr. 808; Jt. Ex. 21) Direct support services include: academic advice from Athletic Academic Advisors who monitor student-athletes' grades and coursework and help them to succeed academically; a class attendance policy; assistance with a student-athlete's class and travel conflicts; a scheduling protocol; a freshman study skills program that includes mandatory meetings with Advisors and study hall time; and study skills and tutoring programs. (Tr. 809-11, 823-37, 855-56, 864, 1271-72) The Athletic Department also offers personal development programs that emphasize values of campus and community service, diversity and leadership and provide professional development opportunities, including networking and internships. (Tr. 811-13, 884-910)

F. THE RULES GOVERNING NORTHWESTERN'S FOOTBALL STUDENT-ATHLETES DO NOT MAKE THEM EMPLOYEES OF THE UNIVERSITY

There is no evidence that Northwestern places its football student-athletes under "strict and exacting control" throughout the year as found by the Regional Director. (DDE at 15) All Northwestern students – not just scholarship student-athletes – are subject to conduct rules, such

as policies on off-campus housing, hazing, gambling, academic dishonesty, drug and alcohol use, IT systems use, and possession or use of weapons. (Compare Jt. Ex. 17 at NU 157, 174, 176, 189-90, 209, 210, 230 with Jt. Ex. 19 at 9-11, 14, 32, 36-40, 44-45, 47, 48) Northwestern students who choose to live in on-campus housing – not just scholarship student-athletes – must abide by additional "controlling" regulations, such as "quiet hours." (Jt. Ex. 19 at 30) Similarly, students who participate in various extra-curricular activities – not just scholarship student-athletes – may be subject to additional rules associated with those activities. For example, students who participate in student-run organizations–such as fraternities, sororities, affinity groups, and student government–must enter into a "behavioral agreement" before being allowed to travel as a representative of the University. (Em. Ex. 32 at 39) All of these rules impose a measure of control over the lives of the students inherent in a residential educational community that insists that all students, especially those representing the University, conduct themselves appropriately and with respect for others. None of the rules gives rise to an employment relationship.

Neither do the alleged rules "control" the lives of football players. As a threshold matter, it is important to recognize that the extra-curricular activity at issue here is inter-collegiate athletics. Because it is an inter- and not intra-collegiate activity, the rules governing it are mandated by the NCAA and/or Big Ten, and are not unilaterally imposed by Northwestern. (Jt. Ex. 20, Jt. Ex. 22)[6] For example, rules relating to the types of residential leases student-athletes may enter into, the types of outside employment student-athletes obtain, the requirement that attendance be taken at training table, and the requirement that student-athletes submit to random drug testing are all implemented and enforced by the NCAA. (Jt. Ex. 10, Drug Testing Consent

[6] Northwestern cannot dictate NCAA regulations, and lacks authority to deviate from them without penalty, including possible cancellation of a season or loss of NCAA membership. (Tr. 478-80)

Forms; Jt. Ex. 20 at NU 284, 356, 407-421; Jt. Ex. 22 at NU 534, 591-92, 618, 744-45; Tr. 477-79, 505-06, 622-23) Likewise, the forms that football student-athletes must execute, such as the waiver that prohibits student-athletes from profiting from their image or reputation and the vehicle disclosure form, are mandated by the NCAA, not Northwestern. (Id.) These rules apply to scholarship and non-scholarship athletes alike. They are the background rules governing participation *by anyone* in this particular inter-collegiate activity. Whether those rules are wise or necessary is not within the power of the Board to decide or for Northwestern and its players to negotiate.[7] They therefore do not define or govern an employment relationship between Northwestern and its scholarship student-athletes. It is their choice to participate in the extra-curricular activity of inter-collegiate football – an activity defined by this particular set of rules – not an employment relationship, that subjects student-athletes to these constraints.

The Regional Director's discussion of particular instances of alleged "control" simply misunderstands the fundamental nature of inter-collegiate sports and mischaracterizes the record. For example, his conclusion that the goal of study hall is to "control" student-athletes' lives is contradicted by the record. Study hall time prepares the student-athletes for *academic* achievement and assists in transitioning students from high school to college academics. (Compare DDE at 5 with Tr. 856, 859) Similarly, the Regional Director found that football student-athletes are restricted in what they can post on the Internet. In truth, football student-athletes – like all student-athletes, scholarship and non-scholarship alike – are merely subject to guidelines regarding their use of social media and communications with the news media (DDE at 5, Jt. Ex. 17 at NU 158-64, 178-79), and the only evidence concerning this guideline shows that

[7] A federal court is currently assessing certain of those rules under the antitrust laws. In re NCAA Student-Athlete Name & Likeness Licensing Litig., C 09-1967 CW, 2014 WL 1410451 (N.D. Cal. Apr. 11, 2014) (widely referred to as the "O'Bannon lawsuit").

the only time it was even mentioned was in connection with a single "tweet" by Petitioner's Kain Colter that gave rise to concerns about his compliance with NCAA rules. (Tr. 153-54, 475-76.)

G. ACADEMIC SCHEDULING TAKES PRECEDENCE OVER FOOTBALL SCHEDULING

That the relationship between Northwestern and its student-athletes is an educational, and not economic, one is underscored by the extraordinary steps Coach Fitzgerald has taken to minimize conflicts between football practice and student-athletes' academic schedules. In 2007, Fitzgerald moved football practice from the afternoons to early mornings, when fewer classes are scheduled, to minimize class conflicts for players. (Tr. 841-43, 1039-41) Students who nonetheless have scheduling conflicts leave practice early so that they can get to class on time. (Tr. 843-44) Contrary to the Regional Director's finding, the record does not show that football players must attend practices notwithstanding class conflicts. (Compare DDE at 11, 17 with Tr. 1042-43, 1272-73) As the Regional Director acknowledged, but then ignored in his analysis, both scholarship and walk-on student-athletes had class conflicts in Fall Quarter 2012 and all were accommodated. (DDE at 12, n. 25)[8] Coach Fitzgerald and the other coaches also do everything possible to ensure that student-athletes can pursue their major of choice. (Tr. 1219) Football-student-athletes' athletic obligations do not prevent them from taking full advantage of the world-class education offered at Northwestern. During Coach Fitzgerald's eight years, student-athletes from the football program have gone into 35 different professions, including law, medicine, engineering, information technology, wealth management, consulting, entrepreneurship, and secondary education, as well as professional football. (Tr. 909-912, 1050, Em. Ex. 28)

[8] Coach Fitzgerald also allowed a scholarship player to skip practice for an entire week, and to skip a game that weekend, without penalty, to allow the student-athlete to attend to his studies. (Tr. 1061)

The Regional Director ignored abundant evidence that the time student-athletes are required to spend on football-related activities is no greater than the time they spend on academic-related activities. The NCAA limits the time student-athletes are required to devote to football during the school year to 20 hours per week of Countable Athletically Related Activity ("CARA"). (Tr. 118-20, 508-09, 513-18, Jt. Ex. 22 at NU 753-55) Even allowing for the fact that the CARA definition understates football time on game days,[9] there is no support for the Regional Director's conclusion that football student-athletes devote "40 to 50 hours per week" to "football ***duties***." (DDE at 16 (emphasis added)) Although Kain Colter, Petitioner's only fact witness (and a student-athlete who acknowledged that his career goal was to play in the NFL) testified about additional voluntary football activities, that testimony says nothing about "football duties," nor does it distinguish football-related voluntary activities from the myriad non-academic, voluntary activities that occupy the free time of all college students.

Beyond overstating the time required for "football duties," the Regional Director ignored evidence that student-athletes spend at least 20 hours a week in class and additional time studying and preparing for class. (Tr. 176, 1236-37, 1276, 1291, 1308, 1320) He also ignored the fact that the academic year is more than twice as long as the football season. (Em. Ex. 9)

H. ATHLETICS REPRESENTS AN EXPENSE TO NORTHWESTERN JUSTIFIED BY ITS CONTRIBUTION TO THE OVERALL EDUCATIONAL EXPERIENCE FOR ITS STUDENTS

Northwestern is not in the business of football. (Tr. 681-85, Jt. Ex. 19 at 4; Jt. Ex. 28 at NU 2379-80) Northwestern's football revenue subsidizes its non-revenue generating sports (i.e., all other varsity sports except men's basketball), and this revenue, in turn, helps Northwestern offer a range of sports of interest to a broad and diverse student body and to offers both men's and women's varsity sports in compliance with Title IX. (DDE at 13) On an overall basis,

[9] The NCAA counts only three hours of CARA time on game days even though travel time and game time extend beyond three hours. (Tr. 568-69)

Northwestern's Athletic Department operates at a loss, and there is a significant annual revenue shortfall. (Tr. 652-53) In the 2012-13 year, Northwestern subsidized its Athletic Department by $12.7 million so that it could offer a comprehensive athletic program in addition to premier academics. (Tr. 676-77; Em. Ex. 11) If athletics did not contribute to Northwestern's educational mission, there would be no reason for the University to undertake this expense.

Viewed in its entirety, the record establishes that Northwestern scholarship football student-athletes are, first and foremost, students engaged in an educational relationship with the University and, accordingly, are not "employees" within the meaning of the Act.

III. ARGUMENT

A. THE REGIONAL DIRECTOR IMPROPERLY PLACED THE BURDEN OF PROOF ON NORTHWESTERN

In his Decision, the Regional Director asserted:

> A party seeking to exclude an otherwise eligible employee from the coverage of the Act bears the burden of establishing a justification for the exclusion [citing cases]. Accordingly, it was the Employer's burden to justify denying its scholarship football players employee status. I find that the Employer failed to carry its burden.

(DDE at 13) The Regional Director assumed his own conclusion, because the threshold issue here is whether Northwestern's scholarship student-athletes are "otherwise eligible employees." This is not a case in which an employer seeks to exclude from the Act's coverage individuals otherwise determined to be employees. Therefore, the cases on which the Regional Director relied do not apply. Notably, in neither Boston Medical Center Corp., 330 NLRB 152 (1999), nor Brown University, 342 NLRB 483 (2004), was the burden of proof placed on the putative employer.[10]

[10] As the Board's own case-handling manual makes clear, representation case proceedings are "nonadversarial" and their purpose is to develop a record upon which the Board can carry out its responsibilities

By improperly placing the burden on Northwestern, the Regional Director committed legal error. The conclusions he reached based on that improper burden of proof are entitled to no consideration whatsoever.

B. BROWN UNIVERSITY IS CONTROLLING AND SHOULD NOT BE OVERRULED

1. Brown University Appropriately Recognizes The Unique Nature Of The Academic Setting

Institutions of higher learning hold a unique position in American culture, and academic settings differ vastly from industrial settings in structure and purpose. NLRB v. Yeshiva Univ., 444 U.S. 672, 680-81 (1980). Indeed, the U.S. Supreme Court has recognized that:

> [T]he predominant policy [of a university] normally is to operate a quality institution of higher learning that will accomplish *broadly defined educational goals* within the limits of its financial resources. The "business" of a university is education[.]

Id. at 688 (emphasis added). To achieve its educational goals, a university must maintain the freedom to make academic decisions without interference.[11] Intercollegiate athletics is just one of the many "education program[s] or activit[ies]" that a university may decide, in the exercise of its academic freedom, to offer its students. 34 C.F.R. §§ 106.31(a), 106.41; Mansourian, 816 F. Supp. 2d at 874 ("the opportunity for students to participate in intercollegiate athletics is a vital component of educational development.").[12]

The student-educator relationship is predicated upon *mutual* interests in the development of the student's social character and advancement of the student's education. Brown University,

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under Section 9 of the Act. NLRB CASEHANDLING MANUAL FOR REPRESENTATION CASES, § 11181, at 74B11181 (August 2007).

[11] See, e.g., Regents of the Univ. of Michigan v. Ewing, 474 U.S. 214, 225 (1985) ("Considerations of profound importance counsel restrained judicial review of the substance of academic decisions."); Blasdel v. Northwestern University, 687 F.3d 813, 816 (7th Cir. 2012) ("And we must not ignore the interest of colleges and universities in institutional autonomy"); Hosty v. Carter, 412 F.3d 731, 736 (7th Cir. 2005) ("Let us not forget that academic freedom includes the authority of the university to manage an academic community ... free from interference by other units of government, including the courts.").

[12] See also U.S. Government Accountability Office, *Students with Disabilities: More Information and Guidance Could Improve Opportunities in Physical Education and Athletics*, No. GAO-10-519, at 1 (June 2010), available at http://www.gao.gov/assets/310/305781.pdf (noting that athletics is an educational activity).

342 NLRB at 489. By contrast, a central policy of the Act is that the right of employees to organize and bargain collectively maintains equality of bargaining power between employers and employees to guard against the sort of unrest attendant to divergent interests, which can lead to interruptions in commerce. 29 U.S.C. §151. Employers require labor for purposes of producing goods or services. Thus, the parties' interests are *not mutual* – the employer wants to maximize productivity and minimize costs, while employees want to maximize wages and benefits. The Act is fundamentally designed for economic relationships in an adversarial setting, and the principles developed for use in the industrial setting cannot be "imposed blindly on the academic world" where student-educator relationships are authoritarian by nature and of necessity. Yeshiva Univ., 444 U.S. at 680-81.

In recognition of those principles, the Board in Brown University reaffirmed its long-standing analysis by examining whether the graduate student assistants, who were admitted into, not hired by, a university, and for whom supervised teaching or research was an integral component of their academic development, had a "predominantly educational" relationship with the university. Based on the status of graduate assistants as students, the role their positions played in their education, the relationship between the graduate assistants and faculty, and the nature of the financial support they received (which the Board found was "financial aid" and not "consideration for work"), the Board concluded that the overall relationship between the graduate assistants and the university was primarily educational as opposed to economic.

In Brown, the Board overruled New York University, 332 NLRB 1205 (2000) ("NYU I"), which had held for the first time since the Board asserted jurisdiction over private, non-profit colleges and universities, that graduate assistants who were enrolled as students at the university where they performed research and teaching duties were employees within the meaning of the

Act.[13] In Brown, the Board returned to the more than 25 years of precedent that graduate assistants were "predominantly students" as opposed to employees, and stressed that in determining the boundaries of employee status under the Act, both the Board and courts have looked to the Congressional policies underlying the Act, including the core premise that the Act was intended to cover "economic relationships." The Board's longstanding rule that it will not assert jurisdiction over "predominantly educational" relationships honors that premise.[14]

Additionally, the Board endorsed the policy concerns expressed in St. Clare's Hospital, 229 NLRB 1000 (1977), which had been rejected in NYU I:

> [T]he mutual interests of the students and the educational institution in the services being rendered are predominantly academic rather than economic in nature. Such interests are completely foreign to the normal employment relationship and, in our judgment, are not readily adaptable to the collective bargaining process. It is for this reason that the Board has determined that the national labor policy does not require-and in fact precludes-the extension of collective-bargaining rights and obligations to situations as the one now before us.

In rejecting the dissent's argument in Brown that the graduate student assistants in that case were employees under the common law test applied in NYU I, the majority pointed out that even if that were true, it did not follow that they met the definition of an employee under the Act. Instead, the issue of employee status under the Act turns on whether Congress intended to cover the individual in question. Thus, for example, a managerial employee technically may perform services for, and be under the control of, an employer, but is excluded from coverage under the Act by the Supreme Court's decision in NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).[15]

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[13] Previously, in Adelphi University, 195 NLRB 639 (1972), the Board had held that graduate teaching and research assistants were "primarily students." Two years later, in The Leland Stanford Junior University, 214 NLRB 621 (1974), the Board held that research assistants who received stipends or grants to permit them to pursue advanced degrees were "primarily students" and not employees within the meaning of Section 2(3) of the Act.

[14] In a separate concurring opinion, Board member Schaumber agreed with the majority's reasoning and pointed out that graduate student assistants fit poorly within the common law definition of an employee. See 342 NLRB at 490, n. 27.

[15] See also NLRB v. Hendricks Cnty. Rural Elec. Membership Coop., 454 U.S. 170 (1981) (despite employee status, confidential employees not entitled to engage in collective bargaining); NLRB v. Yeshiva Univ., 444 U.S.

2. The Board Should Not Overrule Brown University

Except for the four-year period in which NYU I represented the Board's position, Brown and its precursors, Adelphi University and Leland Stanford, have been the law of the land since 1972. The test for distinguishing between students and employees set forth in Brown is compatible with the Supreme Court's decision in NLRB v. Town & Country Elec., Inc., 516 U.S. 85 (1995) (upholding Board's application of common law agency principles in determining whether a paid union organizer is an employee under the Act).[16] Thus, in Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div., 404 U.S. 157, 168 (1971), the Supreme Court held that "in doubtful cases resort must still be had to economic and policy considerations to infuse § 2(3) [of the Act] with meaning." Likewise in WBAI Pacifica Foundation, 328 NLRB 1273, 1275 (1999), the Board recognized that "at the heart of each of the [Supreme] Court's decisions is the principle that employee status must be determined against the background of the policies and purposes of the Act." The Board also has long recognized that principles developed for use in an industrial setting cannot be "imposed blindly on the academic world." Syracuse University, 204 NLRB 641, 643 (1973) (quoted with approval in Yeshiva Univ., 444 U.S. at 680-81). Brown is fully consistent with those settled principles. It would serve neither the policies of the Act nor the mission of a university to treat students who perform services for the university as both students and employees at the same time.[17]

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672 (1980) (full time faculty are managerial employees excluded from Act's coverage); Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div., 404 U.S. 157 (1971) (retirees not employees under Act).

[16] Contrary to the Regional Director's Decision (DDE at 13-14), the Board has not consistently applied the common law test to determine whether individuals are employees since the Supreme Court's 1995 decision in NLRB. v. Town & Country Elec., Inc. See, e.g., Brown Univ., *supra*; Brevard Achievement Center, 342 NLRB 982 (2004). Even in Research Foundation-SUNY, 350 NLRB 197 (2007), and The Research Foundation of the City Univ. of New York, 350 NLRB 201 (2007), in which the Board distinguished Brown because the employers in those cases were not educational institutions, the Board continued to apply the economic vs. educational relationship test, not the common law right of control test, in deciding that the disputed research assistants were statutory employees.

[17] Brown also is consistent with Boston Medical Center Corp., 330 NLRB 152 (1999), since the interns and residents in that case had already completed their undergraduate educations and were no longer enrolled students.

Finally, in other contexts the Board also has applied a "primary relationship" test in determining whether an economic relationship exists for purposes of employee status under the Act. For example, in apprenticeship cases, the Board examines whether the relationship is "predominantly educational or economic," and has found apprentices not to be employees where the relationship was predominantly educational.[18] Similarly, in Goodwill Industries of Tidewater, 304 NLRB 767 (1991), the Board held that handicapped individuals who performed services for wages were not employees because their relationship with the employer was "primarily rehabilitative" and their working conditions were not typical of those in the private sector. See also Brevard Achievement Center, 342 NLRB 982 (2004) (explaining the "primarily rehabilitative/primarily economic standard" and stating "if the relationship is not primarily an economic one, the Act is not intended to apply").

In sum, the Brown test for distinguishing between students and employees represents a well-reasoned approach, taking into account appropriate statutory and policy considerations. That approach should be applied in determining that Northwestern's scholarship football players are primarily students and not employees within the meaning of the Act.

3. The Regional Director Erred In Holding That Brown University Is Not Applicable

The Regional Director concluded that the test articulated in Brown "is inapplicable in the instant case" (DDE at 18), relying instead on the common law master-servant test to find that Northwestern's scholarship football players are employees within the meaning of the Act. This was an error, and a critical one, since if the Regional Director had properly applied the Brown

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Notably, unlike the absence of **any** collective bargaining history among student-athletes at private or public universities, in Boston Medical Center Corp. there was an existing history of collective bargaining among house staff and graduate assistants even before the Board found them to be employees within the meaning of the Act.

[18] See Towne Chevrolet, 230 NLRB 479 (1977) (student working for a company as part of a vocational training program held to have more of an educational than an employment relationship with the employer); Firmat Manufacturing Corp., 255 NLRB 1213 (1981) (student working under a high school cooperative education apprenticeship program held to have an educational rather than an employment relationship with the employer).

test, the student-athletes at issue here would have been found to be primarily students and not engaged in an economic relationship with Northwestern.

In reaching his conclusion that Brown did not apply, the Regional Director attempted to distinguish the scholarship football student-athletes from the graduate assistants in Brown. He not only misapprehended key facts as set forth above, he also ignored the statutory and public policy ramifications of a finding that students participating in educational opportunities at the university in which they are enrolled fall within the definition of an employee under the Act, an inquiry mandated by Brown. The Regional Director also incorrectly cited Brown for the proposition that whether students receive academic credit for the activities at issue is critical. (DDE at 19) Whether Northwestern's scholarship student-athletes, or any students engaged in activities at a university, receive academic credit for those activities does not address whether their experience is integral to their education. As Northwestern established at the hearing, its athletics program is part and parcel of the University's educational mission. And the record establishes that Northwestern's football program succeeds at integrating athletics and academics: Northwestern's football players have a 97 percent graduation rate and an Academic Progress Rate of 996 out of 1000, both of which rank Northwestern first in the country among FBS football teams.

The Regional Director also downplayed the integration between academics and the life lessons that players learn from participating in Northwestern's football program (DDE at 19), and largely ignored evidence showing that academics at the University takes precedence over athletic activities. In Brown, the Board majority noted and relied on the school's mission statement as one of the factors establishing the educational relationship between the school and

the graduate assistants. Here, the Regional Director completely ignored Northwestern's mission statement, which emphasizes the importance of athletics in its educational mission. (Jt. Ex. 21)

The Regional Director concluded that "this relationship is an economic one that involves the transfer of great sums of money to the players in the form of scholarships," noting that Northwestern expends more than $5 million a year to fund 85 football scholarships and also crediting testimony about revenue generated by football activities. (DDE at 19) Both factual propositions are flawed. First, there is no authority that holds that an employer's profitability is relevant to employee status. If it were, actual employees who work for failing companies – and who genuinely have an economic relationship with their employers – would not be able to organize under the Act. Once that irrelevant factor is removed, the Regional Director's analysis regarding the "transfer of great sums of money ... in the form of scholarships" still results in absurdity. If this is the test for establishing the existence of an economic relationship, and concomitant employee status, it would necessarily follow that *all* Northwestern students who receive athletic scholarships, regardless of the team – whether women's lacrosse or men's wrestling – would be employees under the Act, while all of their non-scholarship teammates bearing the same athletic and academic responsibilities would not be employees.

Moreover, while academic faculty members do not oversee the athletic activities of Northwestern's scholarship football student-athletes (DDE at 19), this fact does not support the Regional Director's view that there is little reason to be concerned "that imposing collective bargaining would have a 'deleterious impact on overall educational decisions' by the Employer's academic faculty." (DDE at 19) As noted above, Northwestern does not treat its athletic program as separate from its educational mission. Academic credit is not the *sine qua non* of educational value; if it were, the school's investment in the resources to support literally hundreds of

extracurricular activities would make little sense. In fact, Northwestern recognizes that education happens in more than just the classroom. And it most certainly believes education takes place on the athletic field, during both preparation for competition and competition itself.

4. Application Of The Correct Test Articulated In Brown University Dictates That Northwestern's Scholarship Student-Athletes Are Primarily Students

In Brown, the Board evaluated whether the relationship between the graduate assistants and the university was "primarily educational," as opposed to an "economic relationship." The Board began by noting "the simple, undisputed fact that all of the petitioned-for individuals are students and must first be enrolled at Brown to be awarded a [graduate student assistant position]." 342 NLRB at 488. Because they were, first and foremost, students, and their status as graduate assistants was contingent on their continued enrollment as students, they were found to be primarily students. The same is true here. Significantly, the Board in Brown found that the monetary stipend received by a graduate assistant was not "consideration for work." Instead, it was financial aid to a student. Id. The same is true here. In Brown, the Board found that the teaching duties of the graduate assistants were an integral aspect of their education. Despite the Regional Director's erroneous ruling to the contrary, the same is true here. As Northwestern established at the hearing, its athletics program is part and parcel of the University's educational mission. Northwestern's Institutional Purpose and Athletic Philosophy contained within the Presidential Directive on Self-Regulation of Intercollegiate Athletics, thus states in part:

> Intercollegiate athletics has long been an integral part of Northwestern University life. The success of the athletic program is inextricably linked to the educational mission of the University, especially with regard to the academic and personal development of student-athletes and the institution's commitment to honoring the highest standards of amateur competition. It is not measured solely by wins and losses.
>
> The well-being of its student-athletes is an integral part of what constitutes success. A truly effective athletic program produces student-athletes who succeed in their academic work as well as in their chosen sport and whose careers after

> graduation are a tribute both to them and their university. As part of the educational mission of the University, the athletic program should provide student-athletes with the opportunity to exercise leadership, to develop the ability to work with others as a team, to accept the discipline of sustained practice and training, and to realize the value of good sportsmanship.
>
> Observance of rules and awareness of policies are integral to the success of a program. It is the responsibility of the University administration and the Department of Athletics and Recreation to adhere to all regulations promulgated for the governance of intercollegiate athletics by the Big Ten Conference, the NCAA, and other groups to which the University belongs. Beyond these controls, and in the interest of its student-athletes, Northwestern has adopted procedures, guidelines, and policies that are more stringent than those for which it is held accountable externally....
>
> The joining of academic experience with athletic performance is the guiding principle behind Northwestern's participation in Division I athletics. To accomplish this goal, Northwestern University offers its student-athletes a comprehensive system of services and resources, including excellent athletic and recreational facilities, high-quality coaching, academic counseling and assistance, first-rate medical care, and highly competitive athletic programs.

(Jt. Ex. 21) The record is replete with evidence that the University's mission statement is more than just a platitude. The following examples, which were largely discounted by the Regional Director, highlight the integration of academics and athletics into the University's pursuit of its broad educational goals: (1) the class attendance policy; (2) the extensive academic support and personal development services available to student-athletes; (3) re-scheduling of football practice to minimize class conflicts; (4) the "traveling test" policy, which allows student-athletes to take exams on the road; (5) faculty review and approval of competition schedules; (6) a ban on competition during finals week; (7) allowing football student-athletes to miss practice sessions to attend class; (8) supplemental academic advising; and (9) Provost's office monitoring of majors and minors selected by student-athletes. (Tr. 171, 219-20, 801, 809-11, 820-30, 834-37, 855-58, 861-62, 877-80, 1025, 1039-41, 1061, 1271-73, Jt. Ex. 16 at NU 15, Em. Ex. 21, Em. Ex. 23, 26, 27)

Just as importantly, the record makes clear that the relationship between Coach Fitzgerald and the football student-athletes bears no resemblance to an employer-employee relationship. Fitzgerald views himself – and several student-athletes testified that they viewed him – as an "educator and mentor." (Tr. 1062-63, 1144, 1233, 1310-11) He is a "molder of men" who takes very seriously his obligation to prepare the student-athletes for life after college by fostering teamwork, collaboration, interpersonal skills and respect for others. (Id.) There is no dispute that his interests in developing the young men he coaches to be successful in life are aligned with the student-athletes' interests. Not only does he encourage student-athletes to succeed academically in word, he does so in deed, and his commitment is to their development as a whole from boys to young men who are well-positioned to contribute to the larger society upon graduation. (Tr. 841-44, 1040-43, 1061-64, 1144-45, 1272-73, 1311) Coach Fitzgerald does not dispense academic credit, but the record makes clear that he is a teacher nonetheless.

Based on the status of Northwestern's scholarship football student-athletes as students, the integral role that participation in intercollegiate athletics plays in their education, and the nature and purpose of the financial support they receive, the overall relationship between these student-athletes and Northwestern is primarily educational, not economic.

5. Imposing Collective Bargaining On Scholarship Football Student-Athletes Is Not Consistent With The Fundamental Purpose And Policies Of The Act

The Regional Director also erred by ignoring public policy considerations, as mandated by the Brown University test, which underscore why Northwestern's scholarship football players are not employees within the meaning of the Act. Moreover, based on those public policy considerations, there are sound reasons why the Board should simply refuse to assert jurisdiction over inter-collegiate athletic programs, much like it has refused to assert jurisdiction over the

horse and dog racing industries notwithstanding the fact that both of those industries generate millions of dollars in revenue. See 29 C.F.R. § 103.3.

a. ***Requiring Collective Bargaining Between Student-Athletes And The University Would Inappropriately Enmesh The Board In Academic Concerns And Impinge Upon Northwestern's Academic Freedoms***

Most importantly, imposing collective bargaining upon the relationship between scholarship student-athletes and the University would interfere with traditional academic freedoms. For example, if a student-athlete's scholarship was revoked because he plagiarized a course paper, or because he failed to attend classes, or because he failed to maintain the required minimum grade point average, those decisions would be subject to the grievance-arbitration process, which would obviously interfere with academic decision-making that has nothing to do with the purported economic relationship between the scholarship student-athlete and the University. Similarly, issues such as minimum GPA requirements for scholarship student-athletes, whether student-athletes receiving financial aid to play football should be subject to less stringent course requirements, whether graduation requirements should be reduced for scholarship student-athletes, whether scholarship student-athletes should be allowed to miss classes to attend practice, whether class attendance is mandatory for scholarship student-athletes, or whether scholarship student-athletes should be excused from academic exams or course paper deadlines that interfere with football activities, are some of the issues that could potentially fall within the realm of mandatory subjects of bargaining but which relate to predominantly academic, as opposed to economic, issues. Whether CAPA presently intends to bargain over these issues is beside the point. Once players are deemed employees, the standards of the Act apply, and the Board would be opening the door to bargaining on these issues in the future. And bargaining on these issues would intrude into educational matters which, as the Board noted in

Brown, are based on unique, individualized considerations and are not well-suited to the collective-bargaining process. 342 NLRB at 490.

Imagine the issues raised by an economic strike or lock-out between the University and scholarship football student-athletes. Whether such student-athletes could continue to engage in academic activities such as attending class, studying in the university library, or using other campus facilities would be a matter of dispute. If such student-athletes went on strike, or were locked-out by their "employer," a university presumably could withhold scholarship money that pays for the students-athletes' tuition, housing and meals, if, as the Regional Director found, a scholarship is compensation for services. Questions like these would directly entangle the Board in core questions of academic concern. To avoid such entanglement, as a matter of sensible policy and out of respect for the academic freedom afforded universities, the Board should refrain from imposing a collective bargaining relationship in this setting.

b. ***Unionization Of Scholarship Football Players Would Create Chaos In College Sports Due To The Varying Federal And State Laws Concerning Union Representation And Collective Bargaining***

If Northwestern scholarship football student-athletes are found to be "employees" under the Act and entitled to unionize and collectively bargain, a fragmented patch-work of labor laws would apply to private and public universities participating in intercollegiate football. Because the Act applies only to private universities, the Regional Director's misguided ruling, when coupled with the "hodge-podge of state-and-local legal frameworks"[19] that apply to the remaining hundreds of NCAA public schools not governed by the Act, will have a chaotic impact and destroy the level playing field among universities.

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[19] See Sanes, Milla and Schmitt, John, *Regulation of Public Sector Collective Bargaining in the States,* Center for Economic and Policy Research, at 3 (March 2014) (collecting and analyzing state and local public sector collective bargaining laws).

This confusion is evident by looking at the Big Ten Conference as an example. Northwestern is the only private institution among 14 conference schools. For 10 of the schools, widely varying state labor laws apply.[20] Three schools are governed by no state or federal collective bargaining law – Indiana, Nebraska, and Purdue. Looking beyond the Big Ten, even more variation exists.[21] And where state law is silent, some municipalities have enacted local labor relations laws.[22] Ultimately, federal, state and local laws define in vastly different ways mandatory and permissible bargaining subjects, economic weapons and dispute resolution procedures. No uniform law would apply, and the rules would be dramatically different depending on the location of the school a student chose to attend. The potential legislative responses to a ruling in favor of CAPA here only further underscore the inability of the Board to set national policy on this issue.[23]

Having organized private university student-athletes and non-unionized public university student-athletes competing in the same conference and NCAA division would disrupt the basis of competition within the intercollegiate sports world, where schools are grouped in Divisions

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[20] Wisconsin law, for example, prohibits public-sector unions from bargaining over workplace safety, pensions, health coverage, hours, sick leave or vacations, 2011 WIS. ACT 10 (March 11, 2011), so University of Wisconsin student-athletes would have no right to bargain about these issues. In Illinois, two different laws, the Illinois Public Labor Relations Act, 5 ILL. COMP. STAT. ANN. § 315/1 *et seq.* (West 2014), and the Illinois Educational Labor Relations Act, 115 ILL. COMP. STAT. ANN. § 5/1 *et seq.* (West 2014), define collective bargaining rights for public sector employees. Both statutes, or neither, could apply to student-athletes at the University of Illinois.

[21] For example, North Carolina, South Carolina and Virginia expressly prohibit public employees from collective bargaining. See N.C. GEN. STAT. ANN. § 95-98 (collective bargaining in public sector is illegal); Branch v. City of Myrtle Beach, 532 S.E.2d 289, 292 (2000) (stating that "Unlike private employees, public employees in South Carolina do not have the right to collective bargaining."); VA. CODE ANN. § 40.1-57.2 (collective bargaining in public sector is illegal). In Tennessee, public-sector collective bargaining is illegal, but the legislature created a specific allowance just for teachers. Compare Fulenwider v. Firefighters Assoc. Local 1784, 649 S.W.2d 268, 270 (Tenn. 1982) ("contracts between municipal corporations and unions representing their employees are unenforceable") with TENN. CODE ANN. § 49-5-602 (permissible only for teachers).

[22] For example, the State of Arizona has no collective bargaining law for public employees, but the City of Phoenix does. See e.g., City of Phoenix v. Phx. Emp't Relations Bd., 86 P.3d 917 (Ariz. Ct. App. 2004).

[23] On June 16, 2014, Ohio Governor John Kasich signed a bill amending the Ohio Revised code to prohibit the recognition of any student-athlete as an "employee" of the state university. See H.B. 483 § 3345.56, 130th Gen. Assemb., 2013-2014 Sess. (Ohio 2014); The Ohio House of Representatives, 130th Gen. Assemb., *Governor Kasich Signs House Bill 483* (June 17, 2014), http://www.ohiohouse.gov/robert-sprague/press/governor-kasich-signs-house-bill-483.

based on similar numbers of sports programs offered for men and women, level of financial aid awards for athletic programs, and scheduling requirements, among other things.[24] Regardless of whether unionization ultimately means being able to offer more benefits, or dealing with greater restrictions, it will profoundly alter college sports, which assuredly is not what Congress intended in passing the Act.

That such a fragmented system cannot work is demonstrated by the fact that in no U.S. professional sport are there some teams with union-represented players and others without unions, and in no setting does one group of athletes negotiate solely with one team. In the NFL and in all other unionized professional sports, all of the employers bargain together with an association representing all of the athletes.[25] Under the Regional Director's model, private school student-athletes would be able to unionize portions of individual teams, negotiate over economic and non-economic conditions and even strike, while most public school student-athletes competing in the same sport within the same conference would not have such rights.

The impact of the Regional Director's reasoning goes far beyond football. According to the Regional Director, the decisive factor in determining employee status is the receipt of scholarship aid. Consequently, any student-athlete at a private school who receives a scholarship potentially could organize under the Act. Although CAPA may seek to represent only Division I football and men's basketball players, there is no reason to distinguish the scholarship student-athletes who play volleyball, tennis, golf, lacrosse, field hockey, water polo, or any other sport. Those sports, to be sure, may not be "profitable," but to the extent that a university charges even a nominal sum for spectator admission, or programs, or concessions, they are "revenue-

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[24] See *About Us, Who We Are, Membership*, NCAA (June 9, 2014), http://www.ncaa.org/about/who-we-are/membership.

[25] Another fundamental difference in professional sports is that all players on a team are represented by the union, as opposed to the intra-team split created by the Regional Director's decision excluding non-scholarship student-athletes from a bargaining unit comprised solely of those who receive athletic financial aid.

generating" and thus indistinguishable from football and basketball. Nor is there any principled basis for distinguishing Division II scholarship student-athletes. All of these student-athletes receive athletic aid to help off-set the cost of their education, and all perform athletic "services" for their schools. Under the Regional Director's ruling, all could be deemed "employees" under the Act. But to do so is inconsistent with the purposes and policies of the Act, and would create a chaotic environment in collegiate sports without any indication Congress intended to permit collective bargaining in a form that does not exist elsewhere and has never occurred before.

c. *Third Party Constraints On Bargaining Are Relevant In Determining Whether Northwestern's Scholarship Football Players Are Employees Within The Meaning Of The Act*

NCAA regulations that constrain Northwestern's ability to engage in collective bargaining over a wide array of mandatory subjects of bargaining are a relevant factor in deciding whether Northwestern's scholarship football players are employees under the Act, despite CAPA's reliance on Management Training Corp., 317 NLRB 1355 (1995).[26] For example, in Seattle Opera Association, 331 NLRB 1072 (2000), decided after Management Training, the Board observed that "at the heart of the Supreme Court decisions considering whether disputed individuals are employees within the meaning of Section 2(3), is the principle that employee status must be determined against the background of the policies and purposes of the Act." See also Toering Electric Co., 351 NLRB 225 (2007) ("the Board and the courts have been left with the task of defining the word ["employee"] in ways that are consistent with the legislative purpose of the Act"). Among the key purposes of the Act are to "restor[e] equality of bargaining

[26] The Board currently does not consider restrictions on an employer's ability to engage in effective or meaningful collective bargaining due to governmental or third party controls in determining whether an entity meets the definition of an "employer" under Section 2(2) of the Act. See Management Training Corp., 317 NLRB 1355 (1995) (overruling Res-Care, Inc., 280 NLRB 670 (1986)); N.L.R.B. v. Young Women's Christian Ass'n., 192 F.3d 1111 (8th Cir. 1999). However, from at least 1986 until 1995, the Board examined both whether the employer retained control over the "essential terms and conditions of employment" and whether the employer retained control over those areas of its labor relations that are sufficiently important for meaningful collective bargaining.

power between employers and employees," and to "encourage[e] the practice and procedure of collective bargaining." 29 U.S.C. § 151. Where, however, the employer is prevented from bargaining over core aspects of the mandatory subjects of bargaining set forth in Section 8(d) of the Act by constraints imposed by a third party, those purposes are frustrated rather than served if the Board ultimately finds that the scholarship student-athletes at issue are employees.

Not only is it bad policy to force a university to bargain with its students over such matters, Northwestern would face a classic "Catch-22" if it were forced to collectively bargain with a student-athlete union. While CAPA claims that it does not intend to bargain over subjects regulated by the NCAA, nothing stops CAPA from making such demands now or later. Northwestern would face unfair labor practice charges for refusing to negotiate over mandatory subjects of bargaining, and yet risk drastic NCAA sanctions for *even offering* any economic benefit that is prohibited by the NCAA.[27] Even if CAPA were to honor its commitment not to bargain over issues regulated by the NCAA, nothing would stop other student-athlete unions at Northwestern or elsewhere from doing so. Forcing a university into this position is unprecedented, would ill-serve the student-athletes (who would suffer if the school were prohibited from competition), and should not be done here.

d. *If Athletic Scholarships Are Taxed As Personal Income, The Dream Of Higher Education Could Be Too Expensive For Students*

If the Board were to find that Northwestern football scholarship recipients are employees because the scholarship benefits they receive are compensation for services rendered, that ruling

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[27] As the Supreme Court recognized, the NCAA mandates amateurism, which means student-athletes cannot be paid for participating in a college sports program. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 88-89 (1984). NCAA regulations make clear that athletes may not be "paid to play" and courts have regularly upheld NCAA bylaws protecting amateurism in college athletics. See, e.g., Banks v. Nat'l Collegiate Athletic Ass'n, 977 F.2d 1081, 1089-90 (7th Cir. 1992) (NCAA rules revoked athlete's eligibility to participate in an intercollegiate sport in the event that the athlete chose to enter a professional draft or engage an agent to help secure a position with a professional team); McCormack v. NCAA, 845 F.2d 1338, 1345 (5th Cir. 1988) (NCAA rules limited compensation for football players to scholarships with limited financial benefits).

could make the scholarship benefits taxable income under the Internal Revenue Code.[28] During the 2013-2014 academic year, 88 of 113 Northwestern football student-athletes received athletic scholarships, which neither the University nor the student-athletes treated as wages or income. (Tr. 247-48, 751, 788-89) Northwestern's football student-athletes typically receive scholarships totaling $61,000, or more, per academic year, which over four to five years totals between $244,000 and $305,000. (DDE at 3) Even assuming the lowest federal tax bracket, the tax bill on this income would be at least $10,000 annually, not counting state taxes, and could deprive a student-athlete of the chance to earn a college degree because of the additional tax burden.

Thus, a Board ruling that student-athletes "render services" to their schools as employees in exchange for compensation in the form of scholarships could upend long-settled principles and result in athletic scholarships being treated as taxable income.[29] The Tax Code has been interpreted as giving athletic scholarships special status by exempting them from federal income taxes. Rev. Rul. 77-263, 1977-2 C.B. 47, at *2 (1977). The Board should recognize, as Congress already has, the unique nature of scholarship student-athletes.

e. *Extending Collective Bargaining Rights To Scholarship Football Student-Athletes Will Have Title IX Ramifications*

Title IX requires colleges and universities that receive federal funding to afford equal opportunities in varsity sports to female students. 20 U.S.C. §1681(a). Title IX represents a clear national policy to protect the educational interest of all students regardless of gender, and to effect that national policy, it requires recipients of federal financial assistance (like

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[28] Section 117 of the Code excludes scholarship tuition grants from gross income *unless* services are required as a condition of receiving the grant. 26 U.S.C.A. §§117 (a), (b)(1). See also, Rev. Rul. 77-263, 1977-2 CB 47.

[29] See, e.g., Bingler v. Johnson, 394 U.S. 741 (1969) (holding that work-study grants to recipients working on doctoral degrees were taxable income where there was an employer-employer relationship, the recipients of the funds also received benefits, and they were required to return to the employer). See also Parr v. U.S., 469 F.2d 1156 (5th Cir. 1972); Hembree v. U.S., 464 F.2d 1262 (4th Cir. 1972); Wertzberger v. U.S., 441 F.2d 1166 (8th Cir. 1971) (holding that medical resident salaries were not scholarships or fellowships for purposes of exclusion under I.R.C. Section 117).

Northwestern) operating or sponsoring "inter-scholastic, intercollegiate, club or intramural athletics" to "provide equal athletic opportunity for members of both sexes."[30] This requirement has been confirmed by federal court decisions mandating that universities provide equal opportunity for women's athletic programs.[31]

Paying some participants in a men's sport, whether in cash or other economic benefits, but not participants in women's sports, would violate the equal treatment requirement. Once again, CAPA's present intention not to bargain over "pay for play" is irrelevant. Eventually, if allowed to engage in collective bargaining, and if such collective bargaining does not destroy the football program because of an inability to comply with NCAA or conference regulations, male football players will receive additional economic benefits. Those benefits must then be provided to female student-athletes under Title IX, potentially threatening their eligibility as well. The legal consequences of CAPA's argument are impossible to contain, and the degree of disruption of intercollegiate athletics among schools with unionized athletes is impossible to predict.

C. THE COMMON LAW TEST IS MISPLACED IN THE EDUCATOR-STUDENT RELATIONSHIP

Rather than apply the Brown test, which was designed specifically for the education environment, the Regional Director applied his own hybrid version of the common law "right to control" test. (DDE at 13) That test is designed to distinguish independent contractors from employees and cannot be applied in the educational context where, by necessity, there is pervasive control of students at every level. It is beyond dispute that students are necessarily

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[30] Federal law makes varsity sports at Northwestern an "education program or activity" and thus requires equality in athletic financial assistance (scholarships), and other program components (the "laundry list" of benefits to and treatment of student-athletes). The "laundry list" includes equipment and supplies, scheduling of games and practice times, travel and daily per diem allowances, access to tutoring, coaching, locker rooms, practice and competitive facilities, medical and training facilities and services, publicity, recruitment of student-athletes and support services. See 34 C.F.R. § 106.41(c).

[31] See, e.g., Biediger v. Quinnipiac Univ., 928 F. Supp. 2d 414 (D. Conn. 2013) (enjoining university from eliminating women's volleyball team due to financial constraints); Mansourian, 816 F. Supp. 2d at 874 ("the opportunity for students to participate in intercollegiate athletics is a vital component of educational development.").

subject to the authority of administrators, faculty and coaches, who are charged with their holistic development and personal well-being and safety. In such circumstances, where a rigid application of the principles developed under the Act for other purposes is inappropriate, the Supreme Court has held that the Board "possesses a degree of legal leeway" to "depart[] from the common law of agency" in administering the Act. Town & Country Elec., Inc., 516 U.S. at 89-90, 94. Nevertheless, the Regional Director ignored Board precedent from the context of higher education and applied his own version of the "common law" master-servant test to conclude that the scholarship football student-athletes are employees. (DDE at 13-14)

The common law "test" of agency has its roots in the traditional master-servant relationship, which at its most basic level involves the hire of one party, by another party, to perform services in exchange for remuneration. The Restatement of Agency sets forth the classic formulation of the test, and in doing so, specifically contrasts the independent contractor – who is not subject to an employer's control – with the "servant" – who is. RESTATEMENT (SECOND) OF AGENCY, § 220 (1958). According to the Restatement, a servant is "a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." Id. The Restatement lists several factors to be analyzed in determining whether a party is an independent contractor as opposed to a servant.[32] See also Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323-24 (1992) (using common law test to distinguish between "employee" and "independent

[32] The Restatement factors include: (a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business. RESTATEMENT (SECOND) OF AGENCY, § 220 (1958).

contractor" under ERISA)[33]; Community for Creative Non-Violence v. Reid, 490 U.S. 730, 750-51 (1989) (same under Copyright Act of 1976); NLRB v. United Ins. Co. of Am., 390 U.S. 254, 256) (1968) (same under NLRA). The distinction between employee and independent contractor assumes that both are engaged in a fundamentally commercial endeavor. The ultimate purpose of the test is to assess whether the individual is in that commercial endeavor for himself.

Here, the question is whether scholarship student-athletes are engaged in a fundamentally commercial or educational endeavor. The "control" test cannot answer that question. Control is part of the authoritative culture in the educational setting, so the common law test cannot draw the distinction needed here. Yeshiva Univ., 444 U.S. at 680-81; Brown University, 342 NLRB at 491 ("the issue is not to be decided purely on the basis of older common-law concepts"). Scholarship football student-athletes are neither employees nor independent contractors. They are students.

D. EVEN UNDER THE COMMON LAW TEST, SCHOLARSHIP STUDENT-ATHLETES ARE NOT STATUTORY EMPLOYEES

1. The Regional Director Erroneously Applied An Overly Simplistic Construction Of The Common Law Test

Even if the common law doctrine of agency were the appropriate form of analysis, the Regional Director applied an overly simplistic view of that test in concluding that scholarship football student-athletes meet the definition of "employee" under the Act. In doing so, the Regional Director ignored clear instructions from the Supreme Court by failing to apply the full range of "control" factors articulated in Darden. 503 U.S. at 323-24. Under Darden, "*all* of the incidents of the relationship must be assessed and weighed with no one factor being decisive." Id. (emphasis added). Despite this admonition, the Regional Director selectively and woodenly

[33] In Darden, the Supreme Court reiterated its elaboration on the Restatement's "right to control" factors. 503 U.S. at 323-24.

analyzed just three factors, artificially divorcing scholarship student-athletes from their educational environment and focusing almost exclusively on the right to control when and how the student-athletes engage in football activities.[34]

2. Applying The Common Law Test Correctly Requires A Finding That The Scholarship Football Student-Athletes Are Not Employees Under The Act

An analysis of the limited factors considered by the Regional Director demonstrates that even under the common law test, the scholarship football student-athletes are not employees.

a. *Scholarship Funds Are Not Compensation "For Services"*

The Supreme Court mandates that in determining employee status under the common law, the nature of payment, the tax treatment of such payment and the provision of employment benefits must be analyzed.[35] Initially, the Regional Director completely ignored the undisputed fact that scholarship student-athletes do not receive employment benefits of any sort from Northwestern. (Tr. 250-51) The Regional Director also disregarded the undisputed fact that the University does not remit the financial aid through payroll, and the student-athletes do not receive payroll checks with taxes or other withholdings deducted. (Tr. 247-48, 250, 649) In addition, and without any precedential support whatsoever, the Regional Director also concluded that the financial aid that the scholarship football student-athletes receive is compensation for services, despite the lack of income taxation of the scholarship funds.[36]

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[34] The only other two factors the Regional Director applied were the duration of the relationship and the method of "payment." But again, the Regional Director applied these factors in a formulaic manner, not giving any weight to the true nature of the relationship between the football student-athletes and Northwestern, nor giving any weight to the fact that the student-athletes receive financial aid to attend college, not as compensation for services.

[35] See, e.g., Darden, 503 U.S. at 323-24 (requiring analysis of tax treatment); see also Leland Stanford, 214 NLRB at 622 (finding it "significant[]" that "the payments to the [research assistants] are tax exempt income."); Brown Univ., 342 NLRB at 486, 488, and Boston Medical Center Corp., 330 NLRB at 160 (both finding tax treatment to be critical (if not dispositive) in determining whether the individuals at issue were students or employees).

[36] The Regional Director's reliance on a footnote in Seattle Opera v. NLRB, 292 F.3d 757, 764 n.8 (D.C. Cir. 2002), for the proposition that the lack of taxation of the scholarship funds is immaterial is erroneous, as is the proposition itself. (DDE at 14) In Seattle Opera, the court did not rule on whether the taxable or non-taxable status of the stipends was relevant to the analysis of employee status. 292 F.3d at 764, n.8. Rather, in *dicta*, the court noted

Just as importantly, the scholarship funds, which are guaranteed for four years, are unrelated to the quantity or quality of the student-athletes' performance in competition. In mischaracterizing the scholarships as pay for work, the Regional Director described at length the football-related activities and the time associated with those activities. (DDE at 5-9) He ignored the undisputed fact that a Northwestern football scholarship student-athlete continues to receive the scholarship even if he performs no "work" or "services" for the University; for example, if the student is injured and cannot play, the scholarship continues so long as the student remains in good academic standing. The evidence thus establishes that the scholarship funds are financial aid to facilitate an education and demonstrates Northwestern's commitment to educate – and graduate – every student to whom it grants an athletic scholarship, regardless of how much or how little time the student spends in intercollegiate athletic activities.

Moreover, it is wholly immaterial that the aid is talent-based as opposed to need-based. There is no question that need-based aid is educational in purpose: such aid assists students who otherwise could not afford to attend a prestigious university, by subsidizing the cost of tuition, room and board, and books. (Tr. 723-25, 744-45) The same is true for talent-based aid (whether the talent is in debate, athletics or academics) in that the underlying purpose is also to offset the cost of an education. (Tr. 729-30, Jt. Ex. 16 at NU 26-27) The proposition that talent-based aid is compensation for services while need-based aid is financial assistance defies logic. Indeed, the fact that walk-ons do not receive talent-based scholarships, but are subject to the same rules, expectations and conditions of their football-related activities and may receive need-based financial aid (Tr. 1036, Jt. Ex. 17 at NU 212-216) strongly supports the conclusion that an athletic scholarship is a form of *financial aid* to offset the cost of education, and not

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only that the lack of taxation of payments to employees who were improperly classified as independent contractors did not preclude a finding of employee status under the Act. Id.

compensation for services. The fact that athletic scholarships are not compensation for services is further shown by the fact that aid amounts do not vary based on athletic performance. Scholarship football-student athletes do not receive remuneration – either by way of taxed wages or employment benefits – and thus cannot be "servants" under the common law test.

b. *The Tender Is Not A "Contract for Hire" And There Are No Other Indicia Of An Intent To Enter Into A Master/Servant Relationship*

As part of his strained analysis, the Regional Director reasoned that the scholarship Tender is an employment contract for a term (DDE at 14), something no other tribunal has done.[37] Apart from fundamentally misconstruing the nature of the relationship between Northwestern and the scholarship football student-athlete, the Regional Director mischaracterizes the plain language of the Tender. Critical to the analysis of whether parties have formed an employment relationship is an examination of whether they intended to enter a contract for hire. Here, the Tender demonstrates that the parties simply entered into an agreement to award the student-athlete financial aid.

The content of the Tender is dictated by the Big Ten – not the University – and it sets forth the student-athlete's rights and responsibilities under Big Ten and NCAA regulations related to financial aid. The "Tender" conditions the receipt of aid funds principally on the student-athlete's fulfillment of admissions requirements – making the receipt of funds dependent first and foremost on his status as *student* – and makes no mention whatsoever of "employment" or "labor" or "services" or "hire." Rather, the Tender outlines conditions associated with receipt and continuation of the "financial aid package" granted to the student-athlete. The Tender is

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[37] See Heike v. Guevara, 519 Fed. Appx. 911, 918 (6th Cir. 2013) (observing, in dicta, that "[o]f course, athletic scholarships are not employment contracts"); Banks v. Nat'l Collegiate Athletic Ass'n, 977 F.2d 1081, 1091 (7th Cir. 1992) ("We fail to understand how the dissent can allege that NCAA colleges purchase labor through the grant-in aid athletic scholarships offered to college players when the value of the scholarship is based on the school's tuition and room and board, not by the supply and demand for players.").

nothing other than an "award" letter that informs the student of the amount and duration of the financial aid, and in that regard is no different in purpose from the award letters distributed to the 60 percent of Northwestern students who receive need-based aid. (Tr. 720-21; Em. Ex. 14 at 1-2; *supra* at 7 n.4) The Tender makes clear that the intent of the offer is to provide financial assistance to enable the student to pursue his degree, and not to enter into a "contract for hire."

3. Northwestern Is Not In The "Business" Of Football

Northwestern is in the business of education. Yeshiva Univ., 444 U.S. at 688 (the "business" of a university is education). Varsity athletics, including football, is just one of more than 480 extracurricular offerings at Northwestern. (Jt. Ex. 28 at NU 2380) In analyzing whether scholarship football student-athletes are "hired" by Northwestern to perform "services," the Regional Director focused on the fact that the football program generates positive revenue. (DDE at 14) In his view, because the football activities are "valuable" to the University, the time spent in those voluntary activities must be "work" or "services for hire." (Id.) He cited no authority for the proposition that an employer's profitability – or lack thereof – is relevant to the common law test. Nor does the fact that services may be "valuable" change the analysis. In Brown, the graduate assistants unquestionably performed "valuable services," providing the very educational services (teaching) that the university provided its students. 342 NLRB at 484-85. Nevertheless, because they were enrolled as students, pursuing their own degrees, the Board concluded that they were not "hired" to perform services for the university. Id. at 488-89.

The fact that Northwestern generates revenue from football is immaterial. Educational institutions derive revenue from a host of activities in which students may be involved: drama and music productions and university publications, to name a few. The fact that some students are rewarded for their participation in such activities by having their educational costs defrayed does not mean that any of those activities is a "business" or commercial endeavor – rather, they

are educational activities that Northwestern has the academic freedom to offer its students. Students come to Northwestern for a world-class education, each pursuing distinct goals. Some students aspire to practice medicine, like Doug Bartels, or to play professional football, like Kain Colter. That such students pursue activities that may help them achieve those goals, and that some of these activities may generate revenue, does not alter the fundamental nature of Northwestern's business. Although Colter testified that he came to Northwestern to play football (Tr. 237), the undisputed fact remains that a student-athlete cannot come to Northwestern simply to play football. He must attend class and meet rigorous academic standards.

4. It Is Immaterial That Northwestern Enforces Rules

Athletics have long been a vital component of the U.S. educational system. From the earliest grades, students are required to take physical education classes, and schools at all levels offer their students the opportunity to participate on organized athletic teams. Athletes at every level of the educational system are subject to schedules that dictate practice and competition times and locations. In university life, students are subject to schedules of all sorts, as dictated initially and primarily by their own choices, and to rules and discipline for violations of those rules. Moreover, members of an athletic team must adhere to schedules and rules in order to achieve the common goals of competitive advantage and efficiency. All of this is equally true for football student-athletes who receive athletic aid, for non-scholarship athletes in other sports and for students who participate in a school play. The rules are essential for any functioning group activity, set in a residential university, that provides its members a valuable educational experience. They are not in place to enable an employer to monitor and control its employees for purposes of increasing output of goods and services.

Although the record is replete with evidence of rules and schedules that apply to all students at Northwestern, the Regional Director ignored any rule or schedule other than those

that apply solely to football student-athletes (even while ignoring that such rules apply to *all* football student-athletes, not just scholarship recipients). The Regional Director characterizes the football program schedules as "strict and exacting" and adds that the "location, duration, and manner in which the players carry out their football duties are all within the control of the football coaches." (DDE at 15) Needless to say, there is no other way a football – or any other sports – team can operate. The fact that the participants in the football program practice and meet at times selected by Coach Fitzgerald, travel together, and even eat together does not make them subject to the sort of control inherent in an employer/employee relationship.

Rather, the type of scheduling and control that the coaches have over the football student-athletes (scholarship and non-scholarship alike) is no different from the type of scheduling and control that other educators at the University have over students. Just as a football student-athlete is free to choose whether to participate in the football program, a student is free to choose a particular course of study. Once chosen, certain requirements must ultimately be met. As Kain Colter acknowledged, professors and faculty administrators decide course requirements for each major, decide course offerings and scheduling, select course material, decide when assignments are due and when to administer exams, and have the authority to discipline students. (Tr. 231-35)

Similarly, the Regional Director's focus on team rules is misplaced. First, the vast majority of the rules he cites are related to regulations imposed upon the University by the NCAA and Big Ten (e.g., rules related to residential leases, personal vehicles, outside employment). (Jt. Ex. 20 at NU 284, 356, 407-21; Jt. Ex. 22 at NU 591-92, 534, 618, 744-45; Tr. 477-79, 505-06, 622-24) His conclusion that NCAA and Big Ten regulations and prohibitions do "not detract from the amount of control the coaches exert" (DDE at 16) reflects his fundamental misunderstanding of the nature of the activity at issue. Inter-collegiate sports are defined by

inter-collegiate rules. Those rules, like the rules of the underlying sports themselves, set the competitive boundaries within which the activity occurs; they are not "work" rules or rules designed to "control" the lives of student-athletes. Nor does the fact that Northwestern provides its student-athletes with a Handbook containing the relevant rules, so they do not need to be individually responsible for knowing the details of more than 600 pages of NCAA and Big 10 manuals, change these inter-collegiate activity-defining rules into rules imposed by an employer on its employees. (Compare Jt. Ex. 16 with Jt. Ex. 20 and Jt. Ex. 22) Northwestern is a conduit of information – not an employer that promulgates and enforces rules to increase productivity and profitability, as in an industrial context.

Moreover, Northwestern's own rules – those that do not emanate from the NCAA or Big Ten – are no different from the types of rules applicable to *all* students, and certainly no different than the rules to which non-scholarship football student-athletes are subject (e.g., rules relating to gambling, alcohol and drug abuse, conduct, lights out or quiet hours, off campus housing, academic progress, class attendance, hazing and IT usage). (Compare Jt. Ex. 17 at NU 157, 173-74, 176, 188-91, 210, 225 and 234 with Jt. Ex. 19 at NU 4-5, 7-33, 36-40, 44-49 and Jt. Ex. 28 at 2388, 2394-95, 2408-2637) Violations of these rules subject students to a variety of disciplinary actions, including loss of financial aid. (Jt. Ex. 19 at 12-24) Community participation also requires adherence to rules that promote civility among community members, and these rules are the foundation of a functioning educational community.

Finally, it is wrong and wholly contrary to the record to suggest that Northwestern controls the academic development of its football student-athletes solely to ensure they remain eligible to participate in football. By portraying tutoring, academic advising and professional development services as just another series of time-intensive burdens or "duties" imposed by

Athletic Department personnel and coaches (DDE at 16-17), the Regional Director perversely transforms Northwestern's basic, unshakeable commitment to the education of all of its students into yet another employment duty. The Regional Director's reasoning reveals that his decision was not evidence-based, but predetermined. If Northwestern abandons the education of its student-athletes, it is an employer; but if Northwestern supports the education of its student-athletes, it remains an employer, only with supposedly more onerous "work" demands.[38]

E. DETERMINATIONS UNDER OTHER FEDERAL AND STATE STATUTES CONCERNING THE EMPLOYEE STATUS OF STUDENT-ATHLETE SCHOLARSHIP RECIPIENTS ARE INSTRUCTIVE IN DECIDING WHETHER NORTHWESTERN'S SCHOLARSHIP FOOTBALL PLAYERS ARE EMPLOYEES WITHIN THE MEANING OF THE ACT

Determinations, or the lack thereof, of employee status under other statutes are not binding on the Board. However, the fact that there are no authorities under other statutes that support the Regional Director's reasoning is certainly relevant here.[39] It speaks volumes that, insofar as Northwestern is aware, there is not a single case under our nation's primary labor and employment laws – Title VII of the Civil Rights Act of 1964, the Fair Labor Standards Act or the NLRA – that holds that student-athletes who receive financial aid scholarships are employees within the meaning of those statutes.[40] To the contrary, where courts have considered the question, their analysis supports the conclusion that student-athletes are not employees.

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[38] If one thing was clear from the hearing, it was that Northwestern expends considerable resources on all of its athletes to ensure their academic, athletic and professional success. While some of these support services are mandatory (e.g., Freshmen Year Experience or tutoring for struggling students), that does not make them "employment" duties. These programs and services, even the mandatory ones, are not designed to benefit Northwestern—they are designed to help student-athletes succeed academically and beyond.

[39] See, e.g., Rutherford Food Corp. v. McComb, 331 U.S. 722, 723 (1947) ("Decisions that define the coverage of the employer-employee relationship under the Labor and Social Security acts are persuasive in the consideration of a similar coverage under the Fair Labor Standards Act"); Toering Electric Co., 351 NLRB 225 (2007) (comparing employee status of "salts" under the NLRA with the protected status of "testers" under Title VII); Town & Country Electric, 309 NLRB 1250, 1254 (1992) (in concluding that union salts are employees within the meaning of the Act, the Board relied, in part, on the Supreme Court's holding in Darden, 503 U.S. 318 that the concept of an employee under ERISA, as under the NLRA, was ill-defined and therefore applied the common law master-servant test).

[40] Similarly the overwhelming majority of state courts have held that football student-athletes receiving scholarships are not employees under workers' compensation statutes. See, e.g., Waldrep v. Texas Employers Ins.

1. Under The FLSA, Courts Have Held That Students Are Not Employees Even When They Perform Specific Duties Outside Of The Classroom For Which They Do Not Receive Academic Credit

In Marshall v. Regis Educ. Corp., 666 F.2d 1324 (10th Cir. 1981), the Tenth Circuit held that resident assistants who performed a variety of duties in college dormitories and in return received a reduced rate on their dorm room, the use of a telephone, and a $1000 tuition credit were not employees within the meaning of the FLSA. The court rejected the Department of Labor's (DOL) argument that the resident assistants were employees because their services had an immediate economic impact on the "business" of operating a college. The court found that the argument ignored the broad educational purpose of the college, as well as the expressed educational objectives of the resident assistant program. In holding that the resident assistants were not employees within the meaning of the FLSA, the district court had concluded:

> The RA's involved in this lawsuit did not come to Regis to take jobs. They enrolled as full-time students seeking growth and development from adolescents into mature human beings and desiring to earn the recognition of an academic degree. The opportunity to reduce the cost of their college by being helpful to other students and to the administration in assisting the resident hall program is only one circumstance in the whole activity of the college program. It does not differ from credits granted to student athletes and leaders in student government. Under the economic reality test, and considering the totality of the circumstances, the RA's were not "employees" of the defendant within the meaning of the FLSA.

Id. at 1328. The Tenth Circuit agreed, and, importantly for present purposes, it noted that the legal status of the resident assistants was indistinguishable from student-athletes and leaders in

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Ass'n, 21 S.W.3d 692 (Tex. App.-Austin 2000); Rensing v. Indiana State Univ. Bd. of Trustees, 444 N.E.2d 1170, 1173 (Ind. 1983); Coleman v. Western Michigan Univ., 125 Mich. App. 35 (1983); State Compensation Ins. Fund v. Industrial Comm'n of Colorado, 135 Colo. 570 (1957). State courts have also ruled that scholarship student-athletes are not "employees" in a variety of other contexts. See, e.g., Kavanagh v. Trustees of Boston Univ., 795 N.E.2d 1170 (Mass. 2003) (holding school not vicariously liable for injury inflicted by scholarship basketball player during an intercollegiate basketball game because the student was not an "employee," "scholarships are not wages" and a scholarship student does not "work for" the school in exchange for that scholarship); Shephard v. Loyola Marymount Univ., 102 Cal. App. 4th 837 (Calif. Ct. App. 2002) (holding that scholarship basketball player was not an "employee" under the California Fair Employment and Housing Authority Act and thus could not sue under the FEHA); Korellas v. Ohio St. Univ., 121 Ohio Misc.2d 16 (Ct. Cl. 2002) (scholarship athlete was not an "employee" of the State university for purposes of statute immunizing public employees from suit).

student government who received financial aid. None of those students were, in the view of the Court, employees within the meaning of the FLSA.[41]

In Bobilin v. Board of Educ., 403 F. Supp. 1095 (D. Haw. 1975), the court analyzed whether students who were required to perform cafeteria duty were entitled to minimum wages under the FLSA. Relying on Walling v. Portland Terminal Co., 330 U.S. 148 (1947), for the proposition that the FLSA's definition of "suffer or permit to work" was not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another, the court observed that:

> it would be absurd for this Court to rule that any educational activity would be placed within the requirements of the FLSA simply because there may be an economic benefit to the institution involved. This would throw the baby out with the bath water. The full implication of the Supreme Court's statement in *Walling* that 'otherwise, all students would be employees of the school or college they attended, and as such entitled to receive minimum wages,'...would be met full force.

Bobilin, 403 F. Supp. at 1107-08. Accordingly, the court held that the students and the schools they attended were not engaged in an employment relationship.

2. The EEOC And Federal Courts Have Declined Rigid Application Of The Common Law Test Under Title VII When Considering Employee Status of Students

Like the FLSA, there have been no cases addressing whether student-athletes receiving financial aid are "employees" under Title VII.[42] See Kemether v. Pennsylvania Intercollegiate

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[41] Similarly, in Blair v. Wills, 420 F.3d 823 (8th Cir. 2005), a former student sued his boarding school, alleging it violated the FLSA by requiring him to perform chores, including laundry, cleaning, lawn mowing, brush clearing, painting, general maintenance, and other tasks without compensation. In rejecting the claim, the Eighth Circuit concluded that the student's chores mainly benefited the student, not the school, and he therefore was not an employee. Id. at 829 (chores were intended to instill a sense of teamwork, responsibility, accomplishment and pride). The DOL Field Operations Handbook also states that participation in extracurricular activities such as *athletics*, drama, band, student government, student publications and campus radio or TV station, will not create an employment relationship under the FLSA if the activities are primarily for the student's benefit and part of the institution's educational opportunities, even if the student receives minimal payment. U.S. Dept. of Labor, Wage & Hour Div., Field Ops. Handbook §10b03(e).

[42] The Board invited the parties to address the relevance of Title VII's employment discrimination prohibitions, as compared to the antidiscrimination provisions of Title IX, to the question of employee status under

Athletic Ass'n, Inc., 15 F. Supp.2d 740, 759 n.11 (E.D. Pa. 1998) ("No federal court has defied common sense by holding student athletes to be Title VII employees of their schools or an athletic association."). However, in cases involving students enrolled at a university who have sought relief under Title VII, the EEOC and federal courts have taken one of two approaches in determining employee status: (1) like the Board in Brown, some courts have focused on whether the "services" being performed by the student are incidental to the educational program; (2) other courts have applied the "economic realities" test, focusing primarily (if not exclusively) on the threshold issue of whether the student received remuneration other than financial aid. Either approach is more aligned with the Board's precedent in the educational context than was the Regional Director's analysis.

a. *Services Are Incidental To Educational Program*

In a case regarding the employment status of a student, a federal district court used a test similar to the test applied by the Board in Brown. Pollack v. Rice Univ. involved a prospective graduate student who was denied admission to the university. Case No. H-79-1539, 1982 WL 296 (S.D. Tex. Mar. 29, 1982). Pollack contended that the denial of admission, which also resulted in denial of positions as a researcher and instructor, was improperly based on his Jewish

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the Act. The two statutes demonstrate that Congress clearly intended to provide similar protections to distinct categories of individuals (e.g., employees on the one hand and participants in educational activities – including students – on the other). Based on that clear intent, not only has no court interpreted Title VII to cover scholarship student-athletes, several courts have concluded that an employee who complains about discriminatory treatment of student-athletes does not have a cause of action under Title VII because there is no opposition to an *employment* practice. See, e.g., Lamb-Bowman v. Delaware State Univ., 152 F. Supp. 2d 553, 561 (D. Del. 2001); Garcia v. Mariana Bracetti Acad. Charter Sch., Case No. 10-CV-1117, 2012 WL 706555, at *7 n.7 (E.D. Pa. Mar. 6, 2012). Just as importantly, regulations promulgated under both statutes provide for threshold coverage inquiries in the event a claim for "employment" discrimination is made by a participant in education programs or activities. Both the EEOC and the Department of Education's Office of Civil Rights ("OCR") have promulgated regulations that detail which agency should process and investigate claims of "employment discrimination" made against recipients of federal financial assistance, including universities. See 28 C.F.R. § 42.601, *et seq.*; 29 C.F.R. § 1691.1, *et seq.* There are numerous decisions involving student-athletes who have sought relief against alleged discriminatory actions in their capacities as student-athletes under Title IX, not Title VII. See, e.g., Miami Univ. Wrestling Club v. Miami Univ., 302 F.3d 608 (6th Cir. 2002); Harper v. Bd. of Regents, Illinois State Univ., 35 F. Supp.2d 1118 (C.D. Ill. 1999); Cohen v. Brown Univ., 101 F.3d 155, 161 (1st Cir. 1996).

faith in violation of Title VII. The court framed the issue as whether a plaintiff can maintain a cause of action "for religious discrimination in the admission to a scholastic program which entails the performance of services for remuneration, where the services are completely incidental to the scholastic program." Id. at *1. Without analyzing the common law agency factors, the court concluded that the "jobs" the plaintiff sought and had been denied would have been attendant to his status as a graduate student. Thus, the court concluded, the plaintiff was a "student" and not an "employee." Id.[43] Under this "incidental" test, the scholarship football student-athletes are not employees of Northwestern.

b. *Remuneration Beyond Financial Aid Must Be Present To Find Employee Status*

Other courts presented with the question whether enrolled students are also Title VII employees of their educational institutions have focused on the "economic realities" of the relationship, examining whether the student is economically dependent upon the institution by way of wages or benefits other than financial aid. In applying this test, some federal courts have concluded that before the concept of control can even be analyzed, the threshold question of whether the individual received remuneration must be answered in the affirmative. Summa v. Hofstra Univ., 715 F. Supp.2d 378 (S.D.N.Y. 2010)[44] (the existence of remuneration is an essential condition for an employment relationship under Title VII). Thus, where no remuneration is provided, the inquiry ends. Id.

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[43] See also Bucklen v. Rensselaer Poly. Inst., 166 F. Supp.2d 721, 724-25 (N.D.N.Y. 2001) (dismissing Title VII claim even though graduate student performed teaching and research duties for which he received benefits and wages, from which taxes were withheld, because the challenged decision related to his role as a graduate student).

[44] See also O'Connor v. Davis, 126 F.3d 112, 115-116 (2d Cir. 1997) ("where no financial benefit is obtained by the purported employee from the employer, no 'plausible' employment relationship of any sort can be said to exist"); Haavistola v. Community Fire Co., 6 F.3d 211, 222 (4th Cir. 1993) (adopting the threshold remuneration test); Juino v. Livingston Parish Fire Dist. No. 5, 717 F.3d 431 (5th Cir. 2013) (same); Daggit v. United Food & Commercial Workers In'tl Union, Local 304A, 245 F.3d 981, 987 (8th Cir. 2001) ("without compensation, no combination of other factors will suffice to establish the [employment] relationship"); Llampallas v. Mini-Circuits, Lab, Inc., 163 F.3d 126, 124 (11th Cir. 1998) ("an individual who sues only to maintain a purely gratuitous working relationship does so without the protection of [Title VII]").

The EEOC follows this same approach, particularly in cases involving "interns" or "volunteers."[45] Coverage as an employee under EEOC-enforced laws turns on whether the intern "receives 'significant remuneration' in some form, such as a pension, group life insurance, workers' compensation or access to professional certifications." See EEOC Office of Legal Counsel Informal Discussion Letter, *Federal EEO Laws: When Interns May be Employees* (Dec. 8, 2011) (citing EEOC COMPLIANCE MANUAL, Section 2-III.A.2.c (discussing coverage for volunteers)). By contrast, receipt of a benefit that is incidental to an otherwise gratuitous relationship – i.e., financial aid – will not result in coverage under Title VII. Id.; see also Jacob-Mua v. Veneman, 289 F.3d 517, 521 (8th Cir. 2002) (obtaining research that was valuable to dissertation work was not sufficient remuneration to grant employee status to student intern); Piotrowski v. Barat College, No. 93 C 6041, 1994 WL 594726 (N.D. Ill. Oct. 27, 1994) (nurse who received tuition waiver and practical experience not a Title VII employee); Ferguson v. Edward J. Derwinski, EEOC DOC 01903150, 1990 WL 1109724 (EEOC Office of Fed. Ops. Sept. 12, 1990) (graduate student seeking a social work degree not a Title VII employee as a result of receiving a stipend for financial aid purposes). Under Title VII, financial aid is not remuneration that creates an employment relationship between the student and a university.[46]

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[45] When the issue is whether an unpaid worker is an employee or a volunteer, "control" has only limited relevance. Haavistola, 6 F.3d at 220. Indeed, one court has commented that applying the common law factors to determine whether there is an employer-employer relationship in this context is "like using a screwdriver when the job calls for a wrench." Holder v. Town of Bristol, No. 3:09-CV-32, 2009 WL 3004552, at *3 (N.D. Ind. 2009).

[46] Courts have found students to be Title VII "employees" of the institution where they are enrolled where the benefits or remuneration takes the form of a payment other than financial aid. See, e.g., Cuddeback v. Florida Bd. of Educ., 381 F.3d 1230, 1234-35 (11th Cir. 2004) (graduate student performing research whose continued appointment was based on attendance and communication skills (as opposed to academic progress) received bi-weekly cash payments, sick and annual leave benefits and was subject to a collective bargaining agreement under state law); Summa., 715 F. Supp.2d 378 (student manager of football team received cash payments for her services which university conceded was remuneration); Ruiz v. Trustees of Purdue Univ., No. 4:06-CV-130-JVB-PRC, 2008 WL 833125 (N.D. Ind. Feb. 20, 2008) (graduate student received, in addition to tuition remission, a salary of $18,048 per year and was subject to the university's employment policies); Ivan v. Kent State Univ., 863 F. Supp. 581 (N.D. Ohio 1994) (graduate student received monthly cash payments "in compliance with state and federal law" and from which retirement benefit contributions were withheld); EEOC Decision No. 88-1, 47 Fair Empl. Prac. Cas.

F. EVEN IF SCHOLARSHIP FOOTBALL STUDENT-ATHLETES ARE EMPLOYEES, THEY ARE TEMPORARY AND SHOULD BE PRECLUDED FROM COLLECTIVE BARGAINING

The scholarship student-athletes in Northwestern's football program have, at best, a transitory relationship with the University and cannot be represented for purposes of collective bargaining in light of the lack of any expectancy of continued "employment." The duration of Northwestern scholarship football student-athletes' "employment" is limited, and their interests, as seniors graduate and freshmen enter, are constantly evolving and changing.[47] San Francisco Art Institute is instructive on this point. 226 NLRB 1251 (1976). There, the two testifying students worked as janitors for 2.5 and 3.5 years respectively and worked an average of 35 to 45 hours per week. Id. at 1254 n.2. Acknowledging the intrinsically "brief nature" of a student's tenure at an institution of higher education where the "employee" is enrolled as a student, the Board noted that "no student janitor has ever stayed on past graduation to assume a position as full-time janitor." Id. at 1251-52. The Board's reference to "*naturally* occur[ring]" turnover among the student janitors relates not to the fact that the students do not stay in the janitor jobs for long (since, in fact, some did), but rather to the fact that the students stay at the institution only long enough to complete their studies. Id. at 1252 (emphasis added).

As the Board pointed out in San Francisco Art Institute, the temporary nature of the student's relationship with his educational institution creates the "vexsome" problem "that by the time an election were conducted and the results certified the composition of the unit would have changed substantially." Id. With scholarship football student-athletes voting in a representation election, the composition of the proposed unit will change radically before CAPA is even

(BNA) 1887 (1988), available at 1988 WL 192714 (medical intern received a cash stipend, health, insurance, paid vacation, paid leave, legal defense and indemnification in the event of suit for malpractice).

[47] For example, there were seven graduating seniors who exhausted their playing eligibility following the 2013-14 season, and 15 incoming freshmen who signed National Letters of Intent in February 2014. (Tr. 537, 1030)

possibly certified as the bargaining representative. It would frustrate the purposes of the Act to direct an election in a group of temporary employees. Id.

G. EVEN IF NORTHWESTERN'S SCHOLARSHIP STUDENT-ATHLETES ARE EMPLOYEES WITHIN THE MEANING OF THE ACT, THE BOARD SHOULD FIND THEY ARE PRECLUDED FROM ENGAGING IN COLLECTIVE BARGAINING FOR REASONS OF PUBLIC POLICY

Even if the Board concludes that Northwestern's scholarship football student-athletes are employees within the meaning of the Act, they should be precluded from engaging in collective bargaining for public policy reasons. As demonstrated by the example of confidential employees, the Board has the authority to recognize a category of individuals as statutory employees, but to determine, for policy reasons, that collective bargaining is inappropriate The Hoover Co., 55 NLRB 1321, 1323 (1944); NLRB v. Hendricks Cnty. Rural Elec. Membership Corp., 454 U.S. 170, 179 (1994). There are strong public policy reasons, explained in detail at Section III.B.5 above, for precluding scholarship student-athletes from collective bargaining with the university at which they are enrolled, even if they are deemed to be "employees."

H. A UNIT OF ONLY SCHOLARSHIP FOOTBALL PLAYERS IS NOT AN APPROPRIATE UNIT FOR BARGAINING

The unit defined by the Regional Director is not appropriate for bargaining under the Act, even if, contrary to all the arguments above, the Board concludes that the scholarship student-athletes are "employees." The unit defined by the Regional Director is improperly fractured because it excludes non-scholarship student-athletes (walk-ons) who participate on the same team under the same terms and conditions (minus only the scholarship funds) and thus share an overwhelming community of interests with their scholarship teammates. Northwestern is not arguing that non-scholarship players are employees – they most assuredly are not – but the community of interests they share with their scholarship teammates is so strong that to exclude them from the unit would be wholly arbitrary and render the petitioned-for-unit inappropriate.

A unit is not appropriate if it excludes individuals who have an "overwhelming community of interest" with the individuals who are in the unit. See Specialty Healthcare & Rehabilitation Center of Mobile, 357 NLRB No. 83 (2011).[48] Walk-on student-athletes participate in the football program in the same manner and subject to the same requirements as those who receive athletic scholarships. Walk-ons are subject to the same team rules, limits on practice and playing time, academic eligibility rules, NCAA rules and regulations and the like. (Tr. 225, 1035, 1076, 1166-67. 1222, 1228, 1269-70, Jt. Ex. 17) They also receive the same types of equipment and clothing, serve as starters, receive substantial playing time and, in many cases, receive need-based financial aid. (Tr. 1036-37, 1223, Jt. Ex. 17)

If the Regional Director's unit definition were affirmed, the student-athletes, who participate as teammates in every sense of the word, will have a sharp line drawn between them based not on their exercise of free-choice rights under the Act, but instead based on whether the financial aid they receive is need-based or an athletic scholarship. And because CAPA has said that it will not attempt to bargain over compensation (Tr. 292), this sole distinction between scholarship and walk-on student-athletes is without any significance in this case. It is illogical to suggest that two Northwestern football players who line up side-by-side in a football game, play on the same team, receive the same uniform and other athletic supplies, go through the same practice and pre-game preparation, and strive for the same objectives during the game, do not share an overwhelming community of interest. By excluding non-scholarship student-athletes players, the Regional Director created a fractured, inappropriate unit for bargaining.

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[48] See also Odwalla, Inc., 357 NLRB No. 132 (2011) (finding that petitioned-for unit was not appropriate because it excluded merchandisers who shared an overwhelming community of interest with the employees in the recommended unit); Wheeling Island Gaming, Inc., 355 NLRB 637 (2010) (concluding that the petitioned-for unit, which included only poker dealers and excluded all other dealers in the casino, was not appropriate).

I. PETITIONER IS NOT A LABOR ORGANIZATION WITHIN THE MEANING OF THE ACT

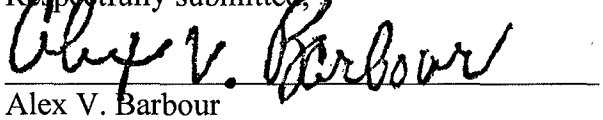
The Regional Director's finding that CAPA is a "labor organization" rested on his erroneous determination that Northwestern's student-athletes who receive football scholarships are employees within the meaning of the Act. (DDE at 23) Because they are not, CAPA does not meet the Section 2(5) definition of a labor organization.[49] Leland Stanford, 214 NLRB 621 (finding that Physics department research assistants were not "employees" and since petitioner did not seek to represent any other category which may be "employees," petitioner was not a labor organization within the meaning of the Act).

V. CONCLUSION

Northwestern respectfully requests that the Regional Director's Decision be reversed, that the Board find that Northwestern's football scholarship student-athletes are not employees within the meaning of the Act, and that the petition be dismissed.

Dated: July 3, 2014

Respectfully submitted,



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[49] CAPA's membership is open only to scholarship athletes who participate in NCAA FBS football and Division I men's basketball who share CAPA's objectives, subject to such qualifications as may be set by the future constitution and/or bylaws of CAPA. (Tr. 283-84; Jt. Ex. 1) Non-scholarship student-athletes are not eligible for CAPA membership. (Jt. Ex. 1) Neither are female student-athletes. (Tr. 284-85)

CERTIFICATE OF SERVICE

I, Alex V. Barbour, an attorney, state under oath that I caused a copy of the foregoing **Northwestern University's Brief To The Board On Review Of Regional Director's Decision And Direction Of Election** to be electronically filed with the National Labor Relations Board and electronically served upon the following on this 3rd day of July, 2014.

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